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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 444

MRS. ROBERT LEE MOORE, et al,

Appellants,

v.

CHARLOTTE-MECKLENBURG
BOARD OF EDUCATION, et al,

Appellees.

BRIEF FOR THE APPELLEES

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QUESTIONS PRESENTED

Appellants have phrased the question as to whether North Carolina General Statute 115-176.1 and the injunction issued by the North Carolina Superior Court pursuant to that statute is consistent with the Fourteenth Amendment to the United States Constitution as expounded in *Brown v. Board of Education* 347 U.S. 483 (1954); 349 U.S. 294 (1955). Appellees can agree as to the substance of the question presented, but would suggest the following form: Did the three-judge court err in holding that certain provisions of North Carolina General Statute 115-176.1 violated the equal protection clause of the Fourteenth Amendment?

ARGUMENT

I

The Court Improperly Utilized an Overbroad Interpretation of the Statute in Determining Its Unconstitutionality.

The three-judge court held the following language of North Carolina General Statute 115-176.1 unconstitutional and of no effect:

> No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origin. Involuntary bussing of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing.

The court held the above provisions unconstitutional for the following reasons:

> The Constitution is not color blind with respect to the affirmative duty to establish and operate a unitary school system. To say that is would make the constitutional principle of *Brown* I and II an abstract principle instead of an operative one. A flat prohibition against assignment by race would, as a practical matter, prevent school boards from altering existing dual systems. Consequently, the statute clearly contravenes the Supreme Court's direction that boards must take steps adequate to abolish dual systems. See *Green v. School Bd. of New Kent Co.*, 391 U.S. 430, 437 (1968). As far as the prohibition against racial "balance" is concerned, a school board, in taking affirmative steps to desegregate its system, must always engage in some degree of balancing. The degree of racial "balance" necessary to establish a unitary system under given circumstances is not yet clear; see *Northcross v. Bd. of Ed. of the Memphis City Schools*, ___ U.S. ___ 38 L.W. at 4220 (1970)

(Chief Justice Burger concurring), but because any method of school desegregation involves selection of zones and transfer and assignment of pupils by race, a flat prohibition against racial "balance" violates the equal protection clause of the Fourteenth Amendment. Finally, the statute's prohibition against "involuntary bussing" also violates the equal protection clause. Bussing may not be necessary to eliminate a dual system and establish a unitary one in a given case, but we think the Legislature went too far when it undertook to prohibit its use in all factual contexts. To say that bussing shall not be resorted to unless unavoidable is a valid expression of state policy, but to flatly prohibit it regardless of cost, extent and all other factors—including willingness of a school board to experiment—contravenes, we think, the implicit mandate of *Green* that all reasonable methods be available to implement a unitary system. (A. 59, 60)

* * *

It is clear that each case must be analyzed on its own facts. See *Green v. School Bd. of New Kent Co.*, 391 U.S. 430 (1968). The legitimacy of the solutions proposed and ordered in each case must be judged against the facts of a particular school system. We merely hold today that North Carolina may not validly enact laws that prevent the utilization of any reasonable method otherwise available to establish unitary school systems. Its effort to do so is struck down by the equal protection clause of the Fourteenth Amendment and the Supremacy Clause (Article VI, Clause 2 of the Constitution). (A. 61).

Appellees submit that the Court was overbroad in its interpretation of the statutory provisions under discussion. Courts, when faced with the question of determining the constitutionality of legislation, engage in every reasonable presumption and/or interpretation in order to uphold constitutionality. *Davies Warehouse Co. v. Bowles*, 321 U.S. 144; *United States v. Carolene Products Co.*, 304 U.S. 144; *Becker*

Steel Co. v. Cummings, 296 U.S. 74. Of course, courts should not and are not required to strain interpretations to reach results that are not warranted, but if all or part of a statute can be interpreted to conform to constitutional standards, such an interpretation should be adopted. Furthermore, courts normally analyze legislation as it is applied to the pending case rather than merely examining the legislation without benefit of the pending case. Consequently, legislation may be held constitutional in application to a pending case, but unconstitutional otherwise or only as interpreted.

In this cause, the three-judge court below construed the first sentence as a flat prohibition against assignment by race. Such an interpretation is overbroad since the statute can be construed in a constitutional fashion: this provision should only apply to unitary school systems. A unitary school system should not be required to assign students because of race. In fact, it is unconstitutional to do so. *Brown*, supra. Where the school system in question is not unitary, assignments based on race may be necessary to overcome the duality of the system as required by the Constitution. Consequently, the double edge of this statutory sword can be reasonably and constitutionally interpreted only in the manner suggested. Otherwise, the interpretation given by the three-judge court below would in some instances be contrary to the requirements of the Constitution prohibiting assignments based on race.

II

Assignment to Achieve Racial Balance Is Not A Constitutional Imperative.

The three-judge court was of the opinion that school boards must "always engage in some degree of balancing" to establish a unitary system. However, the prohibition of the statute against assignments to achieve "a balance or ratio

of race" does not prohibit balancing required to eliminate a dual system. It only prohibits what appellees submit is balancing not required by the United States Constitution to achieve a unitary system. The district court in *Swann v. Charlotte-Mecklenburg Board of Education*, Nos. 281 and 349, now before this court on certiorari, in its order of April 23, 1969, stated that it did not "feel that it had the power to make such a specific order calling for a 70/30 assignment ratio in the schools." However, the district court on December 1, 1969, and February 5, 1970, ordered that "efforts should be made to reach a 70/30 ratio in the various schools so that there will be no basis for contending that one school is racially different from the others . . . ". Although variations of the norm were acceptable, appellees were still required to proceed on this basis and were required to submit a plan as close as possible to a 70/30 balance or ratio. The provision of the statute is not a flat prohibition against "some degree of balancing" necessary to achieve a unitary system. Prohibited are those assignments calling for a *certain* balance or percentage racial composition. Consequently, court orders calling for assignments which do not call for a specified balance or ratio of race are not in conflict with this provision. Only orders as that of the district court in *Swann*, Nos. 281 and 349, requiring specified percentages and/or balances of race are prohibited by the statute.[1]

Many decisions have specifically disapproved of the racial percentage approach in each school or in the school system

[1] If there is any doubt that the district court in *Swann*, Nos. 281 and 349, engaged in racial balance, that doubt may be quickly dispelled by the following: Movement of approximately *300 blacks* and a smaller number of white elementary students would produce racial ratios of 20% to 35% black in each of the 72 elementary schools which serve the 44,500 elementary pupils. Those 300 black students would be transported to remote rural schools, namely, Bain, Clear Creek, Matthews, Newell and Huntersville.

as a whole. See *Ellis v. Board of Public Instruction of Orange County*, 423 F. 2d 203 (5th Cir. 1970), *Goss v. Board of Education, City of Knoxville, Tenn.*, 406 F. 2d 1183 (6th Cir. 1969), *Deal v. Cincinnati Board of Education*, 419 F. 2d. 1387 (6th Cir. 1969).

Rejection by the courts is understandable as neither *Brown v. Board of Education*, 374 U.S. 483 (1954) decision nor the subsequent enforcing *Brown* II case made any mention of racial balancing or percentage approach. The Supreme Court has not required racial balance nor has it suggested the racial balance approach to eliminate segregation. Even the more recent pronouncements of the court in *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968), *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969), *Carter v. West Feliciana Parrish School Board*, 396 U.S. 290 (1970), or *Northcross v. Board of Education*, 397 U.S. 232 (1970) fail to make any reference to racial balance.

III

North Carolina's Statement of Public Policy Is Consistent With the Federal Public Policy Enunciated By Congress in the Civil Rights Act of 1964 and the Supreme Court in Prior Pronouncements.

The 1964 Civil Rights Act, 42 U.S.C. §2000c(b) provides:

> "Desegregation" means the assignment of students to public schools and within such schools without regard to their race, religion or national origin, but "desegregation" shall not mean the assignment of students to public schools in order to overcome racial imbalance.

Obviously, North Carolina General Statute 115-176.1 was patterned after this federal act and a ruling by the court of unconstitutionality regarding the state statute would have

the same effect regarding the federal statute. Congress and the federal courts are encumbered by the due process clause in the violation of individuals' rights in the same manner in which the state legislatures and courts are encumbered by the Fourteenth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954). The vast majority of courts considering the question, either explicitly or implicitly, have either rejected racial balance or not considered it pertinent. If this court were to sustain a racial balance or percentage approach to desegregation, then all previous litigation would be subject to the question of whether these school systems now meet the requirements of the Constitution as so interpreted. Furthermore, a holding of support for such an approach leaves open the question of what percentage or balance is required and, if carried to its logical extreme, would provide every school child a school having the same approximate racial composition as each and every other school in the system. This is not required by the United States Constitution. It was not sought by petitioners or suggested by the Court in *Brown I*[2] and II, *Cooper v. Aaron*, 358 U.S. 1 (1958), *Goss v. Board of Education*, 393 U.S. 683 (1963), *Green*, supra, and related cases,[3] *Alexander v. Holmes County*, supra., or *Northcross v. Board of Education*, supra.

Moreover, this court expressly repudiated a claim for racial balance in jury selection. *Swain v. State of Alabama*, 380 U.S. 205 (1965). There, the court stated (P. 208):

> . . . But the defendant in a criminal case is not constitutionally entitled to demand a proportionate num-

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[2] 21 U.S.L.W. 3164 (1952).

[3] Petitioners' brief in *Green v. New Kent County*, October Term, 1967, No. 695, P. 15, and petitioners' brief in *Raney v. Gould School District*, October Term, 1967, No. 805, p. 29. It is there suggested *Brown II* directed student assignments based on proximity and convenience which is by definition the "neighborhood school," not "racial balance."

> ber of his race on the jury which tries him nor on the venire or jury-roll from which petit jurors are drawn . . .

Similarly, since this court has expressly held that "no person is to be effectively excluded from any school because of race or color," *Alexander v. Holmes*, supra, no student is entitled to demand proportional racial balance in the schools. If it were otherwise, then such terms as "determining admission to the public schools on a non-racial basis", *Brown II*, "conversion to a unitary, non-racial school system", *Green*, supra., and "no longer operate a dual school system based on race or color", *Alexander v. Holmes*, supra, have wholly missed the mark. Racial consideration is the very cornerstone of any plan seeking to achieve racial balance. A requirement of racial balance perverts and destroys the meaning of the equal protection clause. It converts the shield of the due process clause of the Fifth Amendment and the equal protection clause of the Fourteenth Amendment into swords and thereby result in an unwarranted and unlawful deprivation of the rights and liberties of the children thereby affected. This the North Carolina statute prohibits on sound constitutional principles.

The language of the state statute prohibiting assignments "for the purpose of creating a balance or ratio of race" most clearly is a prohibition against the authority of the local boards of education in North Carolina to use their discretion beyond the requirements of the United States Constitution in desegregating schools. The legislature only intended to state in legislative fashion what it considered the existing state of the law to be. The provision was not intended to thwart the orders of a single district court and such provision does not thwart any *lawful* desegregation order.

IV

The Statute Does Not Prohibit Constitutionally Permitted Assignment and the Furnishing of Transportation to Facilitate Such Assignment

The three-judge district court also construed the provision prohibiting "involuntary bussing" as removing a permissible area of action by school boards when desegregating schools. This provision can also be interpreted in a constitutional fashion. This provision prohibits involuntary bussing where the student assignment is based on race or where the assignment is made "for the purpose of creating a balance of ratio of race." While legislation cannot, as noted above, constitutionally prohibit assignments based on race to dismantle a dual system, it is submitted that the United States Constitution does not require involuntary bussing to achieve this result. Nor does the Constitution require such bussing to achieve "a balance or ratio of race."

It is clear that the Constitution requires school boards to act in a nondiscriminatory manner. Their affirmative duty is limited to disestablishing and desegregating a former dual *system*, not racially balancing each school in the system.

In properly construing this duty, the Fifth Circuit in *Ellis*, supra, approved a plan which called for assignment of students nearest their home, the only limitation in the plan being capacity and assignment to the nearest school if the nearest school was overcrowded.

Again, the Fifth Circuit in *Carr v. Montgomery Board of Education*, (slip opinion, June 29, 1970, No. 29,521) held:

> In the present case, the district court held that the Board plan is "realistic and feasible" and will accomplish what the law requires, that is, the complete disestablishment of the dual school system based upon race in the operation of Montgomery, Alabama, public school system. Having examined the record before us, we agree.

This *Montgomery* plan was also essentially based upon proximity and convenience of students.

The Fourth Circuit has intimated that assignment of students to schools nearest their homes would meet the constitutional requirements for both black and white children. *Eelder v. Harnett County*, 409 F. 2d. 1070 (4th Cir. 1969).

It is submitted that transportation required in connection with a plan for assignment of students to the nearest school, a plan based on proximity and convenience, may occasion additional transportation in a desegregation plan.[4] Such transportation would not be barred by the North Carolina statute. It only seeks to bar assignment and transportation of students involuntarily on account of their race.

It is well to note that the three most recent and controlling Supreme Court decisions, *Green*, supra., *Alexander*, supra., and *Northcross*, supra., really do not resolve the transportation issue. *Green* dealt only with the rural school district where cross bussing perpetuated segregation while *Alexander*, which was based upon *Green*, merely stated that it was the obligation of all school districts to operate unitary systems now. *Northcross* was remanded to the district court with the admonition that "no person is to be effectively excluded because of race or color." Thus, the question of whether transportation as a tool is constitutionally

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[4]Compare brief for the United States on Further Argument of the Questions of Relief filed in *Brown II* and related cases (Nos. 1-5), October Term, 1954. Circuit Judge Sobeloff, then Solicitor General, in discussing the need for additional transportation facilities, argued in a footnote 9 as follows:

> [9]The requirement of additional equipment will be generally restricted, of course, to places where present facilities have not been sufficient to provide adequate transportation for all pupils. It cannot therefore be regarded as, in any real sense, a problem arising from the elimination of segregation. (Page 16).

required in an urban context has not been answered. It may be that transportation in some instances is required to eliminate duality, but it should never be required where transportation is used to create a "balance of ratio or race". If the Constitution does not require a percentage approach as submitted above, certainly the tool for achieving this end is not required.

In summary, the legislation should be upheld for the reason that it does not thwart constitutional mandates, but sets the limits on what local school boards can do beyond the constitutional requirements. Viewed in this light, the legislation is constitutional.

CONCLUSION

Upon the foregoing, appellees pray that the court adopt the interpretations suggested relative to the constitutionality of North Carolina General Statute 115-176.1, i.e., the statute is constitutional but may not be enforced in an unconstitutional manner, and reverse the judgment of the three-judge United States District Court for the Western District of North Carolina, holding certain provisions of that statute unconstitutional.

Respectfully submitted this 3rd day of October, 1970.

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